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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SAMMY MAI PHOMMASOUK, Defendant and Appellant.	F056241 (Super. Ct. No. BF122370A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Lee P. Felice, Michael G. Bush, Stephen P. Gildner, Judges.

Harry Zimmerman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant Sammy Mai Phommasouk appeals from a judgment entered after he pled no contest to one count of transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)), admitted he had a prior strike conviction (Pen. Code,[1] §§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)), and was sentenced to eight years in prison. Defendant contends: (1) the trial court erred in denying his request to represent himself (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)); (2) the trial court's use of a prior juvenile court adjudication as a strike violated his constitutional rights to due process and jury trial; and (3) the trial court abused its discretion by denying his motion to dismiss the prior strike conviction (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*)). We affirm.

FACTS[2]

> "On February 16, 2008, officers conducted a traffic stop on a vehicle as the driver had changed lanes without using his turn signal. Officers contacted the driver of the vehicle, Sammy Phommasouk, the defendant. The defendant appeared to be extremely nervous. Further, he could not provide a driver's license or proof of insurance when asked; however, the defendant did state, 'I have a glass pipe in my pocket.' A search of the defendant's person revealed a small black bag which contained a methamphetamine smoking pipe and a clear plastic baggie which held a substance suspected to be methamphetamine. The defendant was handcuffed and detained pending further investigation.
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> "A record check on the vehicle revealed it had been stolen out of Visalia. Officers contacted the victim, Acho Saelee, and informed him his vehicle had been located. The victim was also asked if he could describe any of the items left in the vehicle. According to the victim he left his wallet in the vehicle along with a credit card and his driver's license. The victim also said he left a black and white striped 'footlocker' uniform shirt in the vehicle. Officers noted the defendant was wearing the victim's shirt.

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1 Further statutory references are to the Penal Code unless otherwise specified.

2 Because defendant entered a no contest plea, the facts are taken verbatim from the probation officer's report.

The defendant also had a clear plastic I.D. holder hanging from his neck which contained Saelee's driver's license and credit card.

"The vehicle was searched and a small cloth bag was located between the passenger seat and center console. The bag contained a clear plastic bag which held approximately 38.5 grams of suspected methamphetamine, a white piece of plastic which contained about three grams of suspected methamphetamine and a clear plastic bag which contained several empty used plastic Ziploc baggies and a computer storage device. Further, a fixed-blade knife which measured about four inches in length was located between the front passenger seat and the center console of the vehicle. When officers removed the keys from the ignition they observed the keys were worn down and had scrap marks on the portion of the key that is placed into the ignition. Officers attempted to interview the defendant; however, he refused to comment. He was transported and booked into the Kern County Jail.

"A laboratory analysis of the contraband seized determined it to be .96 gram of a substance containing methamphetamine (Schedule II)."

DISCUSSION

I. The trial court did not err in denying defendant's Faretta motion

Defendant was found competent to stand trial, but, nonetheless, the trial court denied his *Faretta* motion to represent himself. Defendant contends the court erred in refusing to allow him to represent himself despite his assertions that he desired to do so. The parties on appeal recognize defendant's claim is governed by *Indiana v. Edwards* (2008) 554 U.S. __ [128 S.Ct. 2379] (*Edwards*), a case decided about a month before defendant made his request for self-representation but unaddressed in the trial court. In *Edwards*, the United States Supreme Court concluded a trial court may constitutionally deny a defendant the right of self-representation, though the defendant is competent to stand trial. The court held: "[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [v. United States (1960) 362 U.S. 402 (*Dusky*)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Edwards, supra*, 554 U.S. at p. __ [128 S.Ct. at p. 2388].)

On appeal, defendant argues there was no evidence he suffered from severe mental illness that precluded his self-representation under *Edwards*. He also argues the trial court considered improper facts beyond his mental condition because, in its ruling, the court expressed concerns about his lack of legal training and his request for an excessive trial continuance. We reject defendant's arguments and conclude that, in denying defendant's request for self-representation and subsequent reconsideration and renewal motions, the trial court acted well within the scope of its discretion under *Edwards*; the record strongly supports the trial court's finding, first articulated at the original *Faretta* hearing, that although defendant was mentally competent to stand trial, he lacked the mental competence to represent himself.

A. Background

On July 28, 2008, defendant gave his attorney a letter stating he wished to represent himself. The same day, defendant's *Faretta* motion was heard by Judge Felice. Defendant communicated to the court through a Laotian interpreter. Although defendant had previously been found competent to stand trial,[3] the trial court expressed doubt as to whether defendant was competent to waive counsel and represent himself based on remarks by defendant that he was currently hearing voices and having problems with taking his psychotropic medication. The court observed:

> "Although mentally competent to stand trial while being represented by counsel, I don't feel that he has the mental competence to represent himself. Notwithstanding all of the Court's advisals and him giving me the appropriate answers, if he's hearing voices, and those voices are telling him to kill himself, I don't know that it would be appropriate at this time to grant his motion."

In response to the trial court's comments, defense counsel noted: "Your honor, I believe under the case law the standard is the same; competence to go to trial and

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3 Judge Gildner presided over the previous competency proceedings and, on June 4, 2008, found defendant competent to stand trial.

competence to represent yourself." The prosecutor agreed that this was his understanding of the law. After a break in the hearing, the trial court acknowledged that existing case law appeared to equate competency to waive counsel with competency to stand trial, citing *Godinez v. Moran* (1993) 509 U.S. 389 (*Godinez*) and *People v. Welch* (1999) 20 Cal.4th 701 (*Welch*). The court, however, stated:

> "Notwithstanding case law, if a person is hearing voices, I don't know that I feel comfortable, and he's hearing voices here today, I don't feel comfortable with him waiving his right to counsel. The alternative is, if he takes his medication, then he has these … moments, almost like senior moments, where he drifts off and then doesn't recall what was going on, or what's going on around him. [¶] So I'm going to suspend proceedings and order the appointment of a psychiatrist."

On August 7, 2008, Dr. Carol Hendrix, a psychologist, interviewed defendant. In her written evaluation, Dr. Hendrix opined that defendant was competent to stand trial, although he failed on a competency assessment instrument. Dr. Hendrix doubted defendant was "attempting to do his best." While she considered him competent to stand trial, Dr. Hendrix did not consider defendant competent to waive counsel and represent himself at trial. Her opinion in this regard focused on defendant's lack of legal training and understanding of courtroom procedure, his need for additional time to learn the law, his reliance on other inmates to advise him, and his limited understanding of the English language. Dr. Hendrix also noted that defendant was anxious and fearful about the possibility of being deported to Cambodia because he had been told Cambodians that return to their country are killed. Dr. Hendrix added: "Because of this depression and anxiety he will come across as confused."

Dr. Hendrix's evaluation did not specifically address the court's concerns about problems defendant claimed to be having with his medication. She simply noted that defendant did not need a psychiatric referral because he had already been seen by the mental health department at the Lerdo pretrial detention facility where defendant was being housed, was under their treatment for depression and complaints of hearing voices,

and had been prescribed medication. Under the heading in the evaluation asking whether defendant had the capacity to make decisions regarding antipsychotic medications, Dr. Hendrix responded indirectly that "defendant receives no medication or services when on the streets. He could benefit from counseling." Dr. Hendrix further noted that "[t]here is no evidence of psychosis, delusions in today's session" but "[t]here is evidence of depression, which has most likely been apparent since before age 21."

On August 18, 2008, the matter came on for a continued *Faretta* hearing. After noting that it had reviewed defendant's file and the prior competency proceedings, the trial court stated it was in possession of Dr. Hendrix's evaluation and asked defendant whether there were any reasons why the court should disregard the psychologist's opinion that defendant was not competent to waive counsel and represent himself. To this, defendant responded: "I need some time to -- I need some time to study the law and then prepare." The court thereafter denied defendant's motion to represent himself and set a trial date of August 25, 2008.

On August 21, 2008, the trial court held a hearing on defense counsel's written motion for reconsideration. At the hearing, defense counsel submitted on the moving papers and observed: "I think the biggest issue is if [defendant] is competent to stand trial, he must be considered competent to waive his right to counsel." The court responded: "Well, the problem I have is [defendant], he indicated the other day in court he doesn't have really any knowledge or background with respect to legal procedures and concepts … and I don't know that we can afford him the time given the seriousness of these charges to fully acquire that knowledge." This exchange followed:

> "[DEFENSE COUNSEL]: Your Honor, I believe under the [*Godinez*] case that I cited, the U.S. Supreme Court case, his legal training and ability is not a relevant consideration in determining whether he's competent to waive his right to counsel. That may be a concern the Court has and counsel has, but it's not a reason to deny him his right to self-representation.

"THE COURT: Well, there's also the fact that he indicated to the Court that he hears voices.

"[DEFENSE COUNSEL]: That may be, your Honor, but if he's competent to go to trial and enter a plea bargain and waive his right to counsel, he's competent to waive his right to counsel and represent himself.

"THE COURT: Are you hearing voices today, [defendant]?

"THE DEFENDANT: Yes.

"THE COURT: Okay.

"[DEFENSE COUNSEL]: If the Court wants to refer it for another 1368.

"THE DEFENDANT: I took the medication this morning.

"THE COURT: What?

"THE DEFENDANT: I took the medication this morning.

"THE COURT: And you're still hearing the voices?

"THE DEFENDANT: Yes.

"THE COURT: Okay. I don't have any doubt as to the defendant's competence to stand trial notwithstanding the limited purpose for which the Court did refer the matter to the doctor, Dr. Hendrix.

"She basically reiterated what the original doctor indicated, that he is competent. He's a malingerer, basically. So I guess that I should ignore his indications that he does, in fact, hear voices."

The trial court then questioned defendant whether, if allowed to represent himself, he would be ready for trial, which was set for August 25, the following week. Several times, defendant stated he did not understand what the court was asking and the court rephrased the question for him. Defendant explained: "Because I took the medication, I may be slow to respond to your answer." Eventually, defendant stated that he had not realized trial was set to begin on August 25. The following exchange ensued:

"THE COURT: Are you ready to go to trial Monday of next week if I grant you this request to represent yourself?

"THE DEFENDANT: I need time, one or two years.

"THE COURT: All right. At this time I think that that would be an inordinate amount of time, and, therefore, I'm going to deny the request to represent himself given the fact that he's indicated that he will need one to two years to be ready to go to trial in this case, [defense counsel]. So you've made the record.

"[DEFENSE COUNSEL]: Thank you.

"THE DEFENDANT: I need more time, your Honor.

"THE COURT: All right. I appreciate that, sir, but we don't have one or two years to give you. I'm sorry."

When the matter came on for trial before Judge Bush on August 25, 2008, defendant renewed his request to represent himself. The trial court asked some questions about the previous motions and asked defendant how much time he was seeking to prepare for trial. Defendant requested three to six months. Ultimately, the court denied defendant's renewal motion on the ground no change of circumstance had been shown. The court thus stated:

"[Defendant], this has already been decided by Judge Felice. I want to know if there was some change of circumstance since he denied it. Doesn't sound like there is. [¶] … [¶]

"As I'm doing this on the fly, which is probably a bad idea, I don't know that I'm in a position to reconsider the ruling by Judge Felice. He heard the evidence, apparently, or even the doctor's report, he heard argument. He was even asked to reconsider that, and he still denied the *Faretta* motion. It doesn't appear to me that anything has changed in the last -- it's been four weeks -- in the last four weeks or so since the initial hearing, initial request. Nothing has certainly changed since last Thursday, four days ago, when the motion for reconsideration was denied. I'll trust that the ruling was correct."

B. Analysis

In arguing in favor of defendant's *Faretta* motion below, defense counsel relied on established case law predating *Edwards*, holding that the standard of mental competency required for pleading guilty and waiving the right to counsel is the same as the standard

of mental competency required for standing trial, i.e. whether the defendant "has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" (*Godinez, supra*, 509 U.S. at pp. 391, 396, quoting *Dusky, supra*, 362 U.S. 402 (per curium); see also *Welch, supra,* 20 Cal.4th at p. 732 ["As the United States Supreme Court has made clear, the two standards of competence are the same"].) In *Godinez,* the Supreme Court considered whether a criminal defendant who sought to waive his right to counsel and enter a plea of guilty should be held to a higher competency standard than the competency level required to stand trial. (509 U.S. at p. 391.) The court answered the question in the negative, "reject[ing] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard." (*Id.* at p. 398.)

As noted above, in *Edwards, supra,* the United States Supreme Court ruled that even if a defendant has been found mentally competent to stand trial, a trial court may insist that the defendant be represented by counsel (thereby curtailing his right to self-representation) where the defendant suffers "from severe mental illness to the point where [he is] not competent to conduct trial proceedings by [himself]." (554 U.S. at p. __ [128 S.Ct. at p. 2388].) The court distinguished *Godinez* on two grounds. First, *Godinez* involved a defendant's ability to proceed on his own to enter a plea, not his ability to conduct trial proceedings. (*Edwards,* at p. __ [128 S.Ct. at p. 2385].) Second, *Godinez* held that a state could permit a "gray-area defendant"[4] to represent himself. It did not tell a state whether it may deny a gray-area defendant the right to represent himself. (*Edwards,* at p. __ [128 S.Ct. at p. 2385].)

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[4] "Gray-area defendant" refers to a defendant that "falls in a gray area between *Dusky's* minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose." (*Edwards, supra,* 554 U.S. at p. __ [128 S.Ct. at p. 2385].)

In *Edwards*, the United States Supreme Court emphasized that the ability to consult with one's lawyer, as required to establish competence to stand trial, differs significantly from the capacity necessary to represent one's self:

> "[T]he nature of the problem before us cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself. Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways.… In certain instances an individual may well be able to satisfy *Dusky's* mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.… [¶] … [¶] Further, proceedings must not only be fair, they must 'appear fair to all who observe them.' … [T]he trial judge … will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." (*Edwards*, *supra*, 554 U.S. at pp. __ [128 S.Ct. at pp. 2386-2387].)

The Supreme Court also emphasized that a self-representation right at trial should affirm the defendant's dignity. (*Edwards*, *supra*, 554 U.S. at p. __ [128 S.Ct. at p. 2387].) Self-representation by an individual who lacks the mental capacity to conduct his defense without the assistance of counsel fails to affirm the individual's dignity. "[I]nsofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." (*Id.* at p. __ [128 S.Ct. at p. 2387].) As such, "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." (*Id.* at pp. __ [128 S.Ct. at pp. 2387-2388].)

As a result of *Edwards*, the trial court in this case had the authority to deny defendant's *Faretta* request if the court believed that defendant was mentally ill and that his mental illness was so severe that he was not competent to represent himself at trial.

(*Edwards, supra,* 554 U.S. at p. __ [128 S. Ct. at p. 2388].) This is clearly what the trial court had in mind at defendant's original *Faretta* hearing when it stated: "Although mentally competent to stand trial while being represented by counsel, I don't feel that he has the mental competence to represent himself." The court's evaluation of defendant's inability to represent himself finds ample support in the record and was consistent with the principles set forth in *Edwards*.

The record contains evidence defendant suffered from mental illness that required medication to remain stable, and at the time of the *Faretta* hearings, he had started to deviate from compliance with his medications. Defendant's first psychological evaluation was performed by Dr. Heather Greenwald in May 2008. Dr. Greenwald's written evaluation, which was part of the record Judge Felice reviewed in deciding defendant's initial *Faretta* motion, noted that defendant had a history of mental illness, which began when he was a juvenile, after he sustained multiple head injuries and witnessed his twin sister die in a car accident. Dr. Greenwald noted that defendant had "recently become increasingly compliant with his medication" and "expressed interest in working with mental health to continue to adjust his medication to reduce residual symptoms." Dr. Greenwald also noted that while defendant denied current suicidal ideation, he had recently been discharged from suicide watch in jail due to self-inflicted cuts on his wrist. With respect to defendant's mental deficits, Dr. Greenwald did not find that defendant was malingering; rather, defendant "appear[ed] to be exerting his best effort" and "was able to respond adequately to questions throughout the interview and demonstrated competency on fourteen of the fourteen measures addressed by the Competency Assessment Instrument." In the concluding paragraph of the evaluation, Dr. Greenwald warned that "*if medication is not made available to [defendant] or if [he] decides to stop taking his medication his competency may be affected*." (Italics added.)

During the subsequent *Faretta* hearing, defendant indicated he was not in regular compliance with his medication. When the court asked whether he was taking

psychotropic medication, defendant responded: "Yes, I take medication. Sometimes, some days I take it and some days I don't. I hear voices in my head." Defendant then told the court: "Here is my medication. I didn't take it this morning because when I take it, I forget." Defendant confirmed with the court that when he took his medication, it helped prevent him from hearing voices but, at the same time, adversely affected his memory and awareness of his surroundings. Defendant's responses to the court's questions during the hearing were consistent with these reports of mental impairment. While the court would carefully and painstakingly advise defendant of the perils of self-representation, defendant would frequently express confusion and ask the court to slow down, expressing understanding only after the court rephrased itself a number of times.

Notwithstanding the trial court's comments regarding defendant's lack of legal training and the amount of time he was seeking to prepare for trial, the record shows the court was consistently and primarily concerned with defendant's mental state, and at at both the original *Faretta* hearing and hearing on defense counsel's motion for reconsideration, the court questioned defendant and defendant indicated he was still hearing voices.[5] On this record, the court acted well within its discretion under *Edwards* in insisting on upon representation by counsel because there was evidence that, while

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[5] We recognize that the court did state at one point, "I guess that I should ignore his indications that he does, in fact, hear voices." But this statement appears to be based on the erroneous belief that the psychologists that interviewed defendant had found he was a malingerer. Contrary to this belief, Dr. Greenwald did not find that defendant was malingering but rather that he did his best in responding to the competency assessment instrument. Neither Dr. Greenwald nor Dr. Hendrix expressed any opinion as to whether defendant ever falsified or exaggerated his symptoms of hearing voices. Moreover, as noted above, Dr. Hendrix did not specifically address the court's concerns about defendant's medications but simply assumed his psychiatric needs were currently being addressed by the jail's mental health department. The only suggestion of malingering appears in Dr. Hendrix's comment that she believed defendant failed his competency assessment instrument because he was not trying his best. The overall record of the court's statements reveals a genuine concern that defendant was actually experiencing auditory hallucinations and indicates the court found defendant's claims pertaining to his medication and mental state were credible.

competent to stand trial, defendant suffered from mental illness that currently interfered with his functioning to a degree that he probably would be unable to carry out the basic tasks necessary to present his own defense; thus, the court's insistence upon representation by counsel helped preserve the dignity of defendant and the fairness of the proceedings. The trial court also properly denied defendant's renewed motion for self-representation on the day of trial because defendant did not show any change in his mental state since the previous court ruling.

We find unpersuasive defendant's argument that the evidence before the trial court did not meet the *Edwards* standard because it did not show he suffered from severe mental illness. In support of his argument, he observes that Dr. Hendrix relied on defendant's lack of legal knowledge, not his mental illness, as the main basis of her opinion that he was not competent to represent himself at trial. But there is nothing in *Edwards* that suggests a trial court cannot rely on its own courtroom observations to evaluate a defendant's competency to represent himself. *Edwards* did not establish a specific threshold of proof of mental illness that must be met before the Constitution will permit a trial judge to deny a defendant's request for self-representation. Rather, *Edwards* "permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." (*Edwards, supra,* 554 U.S. at pp. __ [128 S.Ct. at p. 2387-2388].) Because of the trial court's direct exposure to defendant, the trial court was best able to make fine-tuned mental capacity decisions tailored to defendant's individualized circumstances. (See *id.* at p. __ [128 S.Ct. at p. 2387].) We, therefore, defer to the trial court's conclusions as to defendant's mental state and his ability to represent himself. Because the record supports the court's initial and main stated reason for denying defendant's *Faretta* requests—i.e., that defendant was competent to stand trial but lacked

the competency to conduct the trial proceedings himself—we reject defendant's claim the court erred under *Edwards.*[6]

II. The trial court's use of a prior juvenile court adjudication to impose a sentence under the three strikes law did not violate defendant's constitutional rights.

Defendant contends that because juveniles are not entitled to a jury trial, the trial court's use of his prior juvenile court adjudication to increase his sentence beyond the statutory maximum violated his rights to a trial by jury and due process of law. As defendant recognizes in his reply brief, however, this issue was resolved against him by the recent opinion of the California Supreme Court in *People v. Nguyen* (2009) 46 Cal.4th 1007, holding that a juvenile adjudication can be used to increase a sentence under the three strikes law. (*Id.* at pp. 1010, 1019, 1028.) In light of the recent holding of *Nguyen*, we conclude there was no error in the court's use of the juvenile adjudication as a strike in this case.

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6 Our holding is not altered by the California Supreme Court's recent decision in *People v. Taylor* (2009) 47 Cal.4th 850 (*Taylor*), which defendant cites in his request to file supplemental authority to argue the court erred in applying a higher standard of competence to deny his motion for self-representation. We find *Taylor* inapposite. There, the Supreme Court rejected the defendant's claim that the trial court erred by failing to apply a higher standard of mental competence and granting his motion for self-representation in his 1996 trial because "*at the time … state law provided the trial court with no test of mental competence to apply other than the Dusky standard of competence to stand trial*" and "*definitive federal case law rejected the idea that 'competence to … waive the right to counsel must be measured by a standard that is higher than (or even different from) the Dusky standard*[.]'" (*Taylor, supra,* 47 Cal.4th at pp. 879-880, italics added.) In contrast, *Edwards* had already been decided at the time defendant made his motion for self-representation and thus the court did have a different standard to apply to the question of defendant's competence to represent himself. Although the court apparently was unaware of the *Edwards* decision, for the reasons discussed above, the case clearly supported the court's ruling, and we discern nothing in *Taylor* which would require us to find otherwise.

III. The trial court did not abuse its discretion by denying defendant's Romero motion.

Defendant contends the trial court abused its discretion by denying his request that the court exercise its discretion to dismiss the prior strike conviction. Defendant asserts the trial court placed undue weight on his prior criminal history and failed to consider particulars of his personal background, such as his sister's death and the untreated mental health and drug abuse problems he has suffered as a result.

A trial court may exercise its discretion and dismiss a prior strike conviction if the dismissal is in the furtherance of justice. (§ 1385; *People v. Williams* (1998) 17 Cal.4th 148, 158.) A court's refusal or failure to strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) A trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it. (*Id.* at p. 377.)

A trial court may strike a prior strike allegation. (*Romero*, *supra*, 13 Cal.4th at pp. 529-530.) In exercising its discretion, the trial court must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. (*People v. Williams, supra,* 17 Cal.4th at p. 161.)

The trial court gave the following explanation for denying defendant's motion to dismiss his prior strike conviction:

> "As to the *Romero* motion … I have considered the overall criminal history of the defendant.
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> "I note that prior to picking up the strike prior, the defendant had a [Vehicle Code section] 10851 [unlawful taking or driving a vehicle], a[] [Health and Safety Code section] 11350 [unlawful possession of controlled substance], of course, would have been a felony. I can't tell from the probation report if the 10851 was a misdemeanor or a felony -- and then a

misdemeanor [section] 245 [assault with a deadly weapon] prior to getting the strike prior. He received the strike prior, went to YA. Then five years later he picked up a felony prior, went to the Department of Corrections, a couple misdemeanors, -- well, a misdemeanor and then another commitment to the Department of Corrections in '04 and then two -- a couple misdemeanors after that. So in looking at the overall background of the defendant, that does not bode well for him.

"I also note that in this particular case, many counts were dismissed by the district attorney … which, of course, revolve around the same vehicle and the two prison priors.

"In considering all that and recognizing I do have discretion to dismiss or strike the strike prior under the *Romero* case and other cases, I am going to deny that request. I think that it would be unfair. I think within the spirit of the law, the defendant clearly falls as someone who should suffer a greater enhanced sentence because of his strike prior.

"The bottom line is he simply hasn't learned. Got the strike prior, five years later picked up a second-degree burglary, sentence was doubled. Although it was low term, it was doubled to 32 months. He was told you have a strike prior. A couple years later picks up another felony. I can't tell from the report of the Santa Clara PC 32 in 2000 if that was a midterm doubled to four years or if it was three years plus one for prison. I can't tell. But still, he stole, he knows, he goes back to prison. You have got to mend your ways. He doesn't do it. He picks up two cases after that, two misdemeanor cases and this felony. So when I look at all that, I believe that the prior should not be stricken."

Reviewing defendant's background, character, and prospects, defendant is not outside the spirit of the three strikes scheme. He has not been rehabilitated despite opportunities as a juvenile, and his prospects for future rehabilitation are dim, given his adult criminal history. The trial court's refusal to dismiss the prior strike conviction was not an abuse of discretion. Consideration of the particulars of defendant's background does not alter our conclusion that the court did not abuse its discretion. We also find no record indicating the court failed to give appropriate consideration to all the factors pertinent to its sentencing discretion. (*People v. Carmony, supra,* 33 Cal.4th at p. 378

[trial court ordinarily presumed to have correctly applied law on *Romero* motions, and reviewing courts will not infer sentencing error if record does not affirmatively show it].)

DISPOSITION

The judgment is affirmed.

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HILL, J.

WE CONCUR:

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DAWSON, Acting P.J.

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POOCHIGIAN, J.